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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 27 2009

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Grisson

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a postdoctoral fellow at Northeastern University, Boston, Massachusetts. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien whose benefit to the national interest would be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In an introductory statement, counsel stated that the petitioner "is a well-known researcher and a major contributor in the field of DNA repair and development," and that the petitioner's work "could lead to novel therapies in repairing fetal heart defects." Referring to the impact of the petitioner's work, counsel stated: "One of the most compelling, independently verifiable measures of a scientist's contributions to their field is his or her publication and citation record. . . . [The petitioner's] papers have been heavily cited by researchers around the world." The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We must, therefore, examine the evidence offered in support of counsel's claims.

The petitioner submitted copies of twelve of his journal articles and meeting abstracts published between 1999 and 2006. The evidence submitted with the initial petition offers meager support for

counsel's claim that the petitioner's "papers have been heavily cited by researchers around the world." That evidence consists of a printout from http://scholar.google.com, listing citation data for only one article (rather than the plural "papers" claimed by counsel), written by the petitioner and others while the petitioner was a student in China. The printout identified 14 citations of this article, 13 of which appear to be from Chinese research groups. Citation data for eleven of the articles is provided in Chinese characters without the translation required by 8 C.F.R. § 103.2(b)(3). Of the three articles identified in English, two were written by some of the same article's co-authors in China; the third citation appeared in the *Scandinavian Journal of Immunology* (the same journal in which the petitioner's article appeared) in 2002. Without a translation or transliteration, it is not clear how many of the 11 Chinese-language citations are also self-citations. The citation list, therefore, does not provide clear evidence of more than one independent citation of one of the petitioner's articles. Thus, the initial submission does not support counsel's claim of worldwide citation of multiple papers by the petitioner.

The petitioner also submitted letters from, in counsel's words, "top authorities in the field of DNA repair and development as well as molecular medicine, each with acclaimed contributions to the academia and the industry." Most of the initial witnesses have worked with the petitioner in some capacity, and all but one are based in New England. Professor [redacted] of Massachusetts Institute of Technology provided one of the most concise descriptions of the petitioner's work at Northeastern. Prof. [redacted] stated:

> [The petitioner] has made a very important discovery [regarding] an enzyme (AP endo) that repairs one of the most common lesions (AP site) that occurs in DNA. A common genetic strategy to determine the biological importance of a human DNA repair enzyme is to genetically "knock-out" the corresponding gene in a laboratory mouse and observe what happens. This approach has been unproductive in the case of AP endo since its function is required so early in mouse development that the embryo does not develop and turn into a mouse that can be studied. [The petitioner] had made a major breakthrough in our understanding of the role of AP endo by using a different vertebrate model system – zebrafish, a small fish that can be genetically manipulated in the lab and is also transparent so its organs can easily be viewed. [The petitioner] discovered that AP endo is also critically important for zebrafish development. . . . [The petitioner] discovered that a *partial* deficiency in AP endo resulted in a set of problems – heart defects, poorly developed brains, small eyes, etc. – that we would normally think of a[s] birth defects. Thus, [the petitioner] has concluded that AP endo plays roles both in repairing DNA repair [*sic*] and in regulating early stages of embryonic development. This work will have a major impact on both the DNA repair field and on the developmental biology field as its striking implications become fully appreciated.

(Emphasis in original.) [redacted] the petitioner's supervisor at Northwestern, stated:

> [The petitioner] has truly become a pioneering researcher in the field of DNA repair in development. . . .

> In all likelihood he has identified a new regulatory pathway in embryological development or tied two very disparate ones together. The loss of his services to the current research work would be devastating. These discoveries mean that his work will have a major impact on our understanding [of] the underlying causes of birth defects.

The only witness based outside of New England is [redacted] of the University of Florida, Gainesville, who met the petitioner through her "long time friend and colleague" Prof. [redacted] The bulk of [redacted] December 1, 2006 letter is copied almost word-for-word from Prof. [redacted] November 10, 2006 letter; at one point, [redacted] used the first-person pronoun "we" in discussing the work of [redacted] laboratory, directly quoting [redacted] statement: "We focus on human apurinic/apyrimidinic endonuclease (AP endo)."

[redacted] of the University of Massachusetts Medical School, Worcester, stated:

> I have come to know [the petitioner] as a professional associate via our joint participation in the Greater Boston DNA repair and mutagenesis research meetings and have followed his research since shortly after his arrival at Northeastern University.
>
> [The petitioner] . . . has taken on the very difficult project of understanding the role of a DNA repair enzyme called AP-endonuclease in embryonic development. . . . At present evidence is mounting, in part due to [the petitioner's] contributions, that the developmental requirement for AP-endonuclease is due to a requirement for AP-endonuclease mediated DNA repair, rather than the alternative, that the enzyme plays some critical additional, unrelated role in development. . . . [The petitioner] demonstrated that loss of AP-endonuclease activity results in embryonic lethality [in zebrafish], thereby duplicating the results shown in mice and demonstrating that the developmental role crosses species lines and is intrinsic to this class of enzymes. He has also shown that the developmental defects of the AP-endonuclease deficient zebra fish can be partially reversed by introducing the human AP-endonuclease gene into zebra fish. . . . [These] results . . . will be directly applicable to higher organisms.

[redacted] of Yale University, New Haven, Connecticut, stated:

> [The petitioner] recently was the first author on what I consider to be a seminal paper in the field of DNA repair. . . . [The petitioner] has made the important discovery that a key DNA repair enzyme is necessary for embryonic development. This discovery is the first of its kind and has a great deal of novelty and significance for the field of DNA repair. [The petitioner] is the principal research scientist working on this project, and his long-term involvement in it is absolutely essential in understanding the role of DNA repair in embryonic development.

[redacted] of the University of Vermont, Burlington, stated:

> Although I have never met [the petitioner], it is clear that his research is already making a major impact on the DNA repair field and science in general. . . . To my knowledge there is no one that has the skills or is as well qualified to study the relationship between DNA repair and embryological development.

Certainly, the witness letters contain emphatic endorsements of the petitioner's contributions to his field, but the significance of the wording of those letters diminishes in the face of proof that at least one of these witnesses did not write her own letter (as shown by the virtually identical passages in the letters of [redacted] and [redacted]. The initial letters do not establish that the petitioner has earned a significant reputation outside of New England. Furthermore, the work generally described as the petitioner's most significant had not yet appeared in print when the petition was filed. Witnesses indicated that the petitioner's article had been submitted for publication and was still forthcoming.

On March 20, 2008, the director issued a request for evidence (RFE), instructing the petitioner to submit additional evidence of the petitioner's influence on his field, including evidence of citation of his work. The director also noted that a certified translation must accompany any foreign-language document.

In response, counsel stated: "One of [the petitioner's] most significant contributions in the area of DNA repair is his construction of adeno-associated virus vector and long-term expression of two genes in EBV [Epstein-Barr virus] transformed cells for the first time." This work was the subject of the one cited article that the petitioner had previously documented. We note that counsel barely mentioned this work in the 29-page memorandum accompanying the initial submission, and none of the initial witnesses discussed it at all. It is peculiar, therefore, that counsel subsequently called this "[o]ne of [the petitioner's] most significant contributions." Similarly, while the petitioner's "study [of] the structure, expression and function of novel human leukocyte differentiation angtigens 5D4 and 5C5(gp42)" received little attention previously, after the RFE counsel called this work "pioneering."

The petitioner submitted documentation showing three citations, including one self-citation, of his article "DNA repair protein involved in heart and blood development," published in print shortly after the petition's filing date (but available electronically before that date). The petitioner also submitted an updated version of the citation printout discussed earlier. The updated printout indicated that the number of citations had increased by one, from fourteen to fifteen. The printout showed information in English for ten of the fifteen citations. Of these ten citing articles, seven were written by the petitioner or his collaborators. Thus, the petitioner has documented five independent citations of his work at the time of the RFE.

Four new letters accompanied the petitioner's response to the RFE. Three of the four witnesses are current or former Boston University (BU) faculty members, and their publication records, as shown in their *curricula vitae*, establish collaborative ties between them. Former [redacted] now Director of the Center for Oncology and Cell Biology at the Feinstein Institute for Medical Research, stated:

> In my estimation, [the petitioner] is among the most talented investigators that I have had in my laboratory or have observed in the laboratories of colleagues and collaborators. His noteworthy findings and unique combination of scientific creativity, technical expertise, and rigorous experimental vision have led to paradigm-shifting insights. His noteworthy achievements have been widely acclaimed . . . and I consider it likely that there are very few people with his singular level of expertise.
>
> . . . [The petitioner] has unique and extensive knowledge that can and will further the understanding of how lymphocytes of the immune system become activated, which pertains to their normal function during vaccination against infectious diseases and their abnormal function in autoimmune dyscrasias such as Rheumatoid Arthritis and Systemic Lupus Erythematosis.

[redacted] is the only witness to discuss the petitioner's work regarding "how lymphocytes of the immune system become activated." Dr. [redacted] also discussed the petitioner's well-documented work with zebrafish, but he ambiguously indicated that the petitioner "has completed" that work.

BU Associate Professor [redacted] who co-wrote a 2001 paper with [redacted] stated:

> I have never collaborated with [the petitioner], neither have I ever been a colleague, professor, employer or colleague [*sic*] of his. However, I am well aware of his reputation in the field and familiar with his work through his journal and conference publications. . . .
>
> [The petitioner's] research breakthrough gives new insights into how normal development of [blood, heart and brain] likely takes place in human, and has a great impact on our understanding of abnormal developmental processes that lead to birth defects in babies.

BU Assistant Professor co-author of two papers with [redacted] stated: "Based on his publication record and widely acclaimed research contributions to various important research areas such as cancer and cardiovascular research, [the petitioner] is clearly an invaluable asset to the United States." Dr. [redacted] called the petitioner "a top expert in DNA repair."

The final witness, [redacted] is now an Assistant Professor at the University of Kentucky, Lexington, was a student at Peking Union Medical College, Beijing, China, at the same time as the petitioner in the late 1990s. Dr. [redacted] and the petitioner co-authored several research papers. Dr. [redacted] stated:

> I have collaborated with [the petitioner] for several years, and I'm very familiar with his work. Based on my knowledge of [the petitioner's] contributions, I can confirm that he is one of the most innovative and talented researchers in this field. . . .

> During his Ph.D. studies from September 1997 to November 2002, [the petitioner] initiated two projects to explore the functions of newly-isolated human differentiation antigens, 5C5 and 5D4, encoded by two novel cDNAs. . . . Since these cDNAs were not homologous to any known genes, [the petitioner] made great efforts to characterize their biological features, and his work implicated them as being involved in B cell function. As a result, he published 6 important research articles as first author in leading journals, and published several more in collaboration with others. . . .
>
> [The petitioner] has conducted pioneered [*sic*] research to explore novel genes that contribute to DNA and base excision repair in response to oxidative stress-induced damage.

The director denied the petition on June 17, 2008, stating that the petitioner's "achievements do not establish the petitioner has reached a degree of accomplishment that is substantially greater than his colleagues." The director also concluded that the witness letters in the record "fall short of demonstrating the petitioner's influence on the field beyond his past and present educational institutions and circle of colleagues." Noting that the record documents very few independent citations of the petitioner's articles, the director found that the record lacked "objective documentary evidence" to corroborate witnesses' claims regarding the importance of the petitioner's work.

On appeal, counsel argues that the director's "selective and truncated use of the evidence . . . is highly prejudicial to the petitioner's claim." Counsel asserts that the "Director failed to give due consideration to [the petitioner's] pioneering work in DNA repair enzyme on embryonic development and novel vertebrate model system using zebrafish, and his impressive publication and citation record." The petitioner's record does not speak for itself; the petitioner must establish the importance and impact of his work.

Counsel states that the petitioner's "total number of publications is highly impressive and well exceeds the number of publications expected of a postdoctoral researcher." This may be so, but the petitioner's published articles do not become more important or significant simply because there are more of them.

Initially, counsel had stated that citations are "[o]ne of the most compelling, independently verifiable measures of a scientist's contributions," and even in the appellate brief counsel refers to the petitioner's "impressive . . . citation record." Responding to the director's finding that the petitioner's work has been minimally cited, counsel claims that the petitioner's "research efforts revolve around a brand-new area of molecular research," and that because "the petitioner has technically started a brand new area of research through his groundbreaking discoveries," it is to be expected that there are, as yet, few other research papers citing the petitioner's work.

By the above argument, counsel, on the one hand, emphasizes the quantity of the petitioner's published articles, while on the other hand attempting to explain away the paucity of independent citations of those articles. Counsel's argument does not survive scrutiny. The petitioner's work is "a brand new area of research" only if we define "area of research" so narrowly as to exclude every scientist whose

work does not exactly match the petitioner's work. The petitioner was not the first to research DNA repair, and he was not the first to use zebrafish in genetic research. At best, he was the first to perform specific studies on zebrafish with regard to one particular enzyme. This is not an "area of research," it is an individual research project. Furthermore, most of the petitioner's published articles appeared before he began working at Northeastern University, and have nothing to do with his "brand new area of research" with zebrafish. Therefore, the asserted novelty of his recent research is utterly irrelevant to the citation history of his earlier work.

Counsel then dissects what there is of the petitioner's citation history, and every identified citing researcher is "internationally recognized" or "world-renowned," just as counsel had previously identified the authors of the witness letters as "top authorities" in the petitioner's field. Counsel's habitual use of such hyperbolic language does not appear to be anchored in objective reality. It appears, rather, to be a calculated effort to inflate the importance of everyone and everything that somehow relates to the petitioner and his work. As stated above, the assertions of counsel are not evidence, and counsel's reflexive praise casts a dim light on the inherent credibility of counsel's claims.

Counsel discusses the letters and other exhibits previously submitted in support of the petition, but upon consideration of these materials, the AAO affirms the director's finding that these materials do not persuasively establish the petitioner's eligibility for the benefit sought. We acknowledge that many of the witnesses have attested to the significance of the petitioner's work, but we agree with the director that the record lacks objective evidence to show that the witnesses' assertions are anything more than subjective opinions, or that the witnesses' statements represent anything like the consensus within the field. The witnesses (all of them either based in New England or having demonstrable ties to the petitioner) may sincerely believe that the petitioner's work will revolutionize some aspects of genetic research, but the record does not show that the petitioner's past history has garnered wide notice or produced practical results of a caliber that would justify those beliefs.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.